United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

75-7457

In The

United States Court of Appeals

For The Second Circuit

JAMES MORRISSEY,

Plaintiff-Appellant-Appellee,

vs.

NATIONAL MARITIME UNION OF AMERICA,

Defendant-Appellant-Appellee,

and

JOSEPH CURRAN, SHANNON J. WALL and CHARLES SNOW,

Defendants-Appellants.

SUPPLEMENTAL BRIEF FOR DEFENDANT-APPELLANT, SHANNON J. WALL

BLOOM & EPSTEIN

Attorneys for Defendant-Appellant
Shannon J. Wall

110 East 42nd Street
New York, New York 10017
(212) 687-6050

(8866)

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SUPPLEMENTAL BRIEF ON BEHALF OF
DEFENDANT-APPELLANT SHANNON J. WALL

This brief is submitted on behalf of defendant-appellant Shannon J. Wall to supplement the points raised by all of the defendant-appellants in their core brief served and filed herewith which concentrated on the points common to all of the defendants-appellants. The factual statement and arguments set forth therein are expressly incorporated herein by reference.

ADDITIONAL FACTS APPLICABLE ONLY TO DEFENDANT-APPELLANT SHANNON J. WALL

At the time of Morrissey's arrest, Wall was the national Secretary-Treasurer of the National Maritime Union. His duties were carefully specified in Article 8, Section 2 of the National Maritime Union Constitution (plaintiff's Exhibit 25 - 832E*, at p. 53).

As national Secretary-Treasurer, he was a member of the National Council of the NMU, the governing body of the union between national conventions, consisting of the national president, six vice-presidents and all elected officers in charge of port offices (plaintiff's Exhibit 25 - 832E, at pp. 14-15).

The union hiring hall where Morrissey was arrested was under the jurisdiction of the New York Port Agent (Labaczewski) (plaintiff's Exhibit 25 - 832E, Article 5, Section 5, at p. 15, and Section 4 of Article 13, at pp. 56-58). The limits of Wall's duties as national Secretary-Treasurer are set forth in Section 2, of Article 13 (832E, at p. 53).

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*Parenthetical references are to pages in the Joint Appendix if followed by the letter "A", and to the Joint Exhibit Volume if followed by the letter "E".

Morrissey was an unsuccessful opponent of Wall for national office in the Union. In 1969 he had commenced an action against various individuals and trustees, including Curran and Wall, under Section 501 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. 1501 (Landrum-Griffin Act). In that action, Morrissey sought to hold Wall and Curran personally responsible for certain payments made under the Officers' Pension Plan of the NMU, but Wall and Curran successfully defended the action. See Morrissey v. Curran, et al., 351 F.Supp. 775 (S.D.N.Y. 1972), aff'd., 483 F.2d 480 (2d Cir. 1973), cert. den. 414 U.S. 1128 (1974).

On July 1, 1971, when Morrissey was arrested, Wall was not at the union, had no knowledge of the arrest, and found out about the arrest no earlier than the following day (292A).

Approximately one year earlier, Wall had been approached by the union's Chief of Security, Charles Snow, who explained to him that arguments and fights had broken out in the union hiring hall during the course of distribution of unofficial literature. As it was Snow's duty to keep peace in the hiring hall, he explained to Wall that he would

like a notice posted confirming the union's long-standing policy that unofficial literature could not be distributed within the confines of the union hall (389A). The same information had been given to Wall by the New York Port Agent, Mr. Labaczewski (391A). As a result of this request, a notice (736E) was signed by Wall and posted in the union hall (368A-387A, 394A). This notice was well known to Morrissey. Persons distributing literature (in addition to Morrissey) were, on repeated occasions, asked to distribute the same outside and they complied with this request (453A).

During the course of the trial, the only evidence introduced showed that Wall learned of the arrest of Morrissey only after it had taken place. No evidence was offered to show that Wall had directed the same or took part in any plan which resulted in the arrest. Wall neither aided, assisted, appeared or testified in subsequent prosecution of Morrissey. No single statement or act relating to Morrissey was alleged to have been made or performed by Wall, nor was any evidence offered to prove that Wall took any step or condoned <u>any</u> action affecting Morrissey.

At the completion of the trial the jury returned a verdict against Wall for compensatory damages under both

causes of action*, and for punitive damages of $15,000. under the malicious prosecution cause of action, and $60,000. under the Landrum-Griffin Act.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN FAILING TO SET ASIDE THE VERDICT AGAINST WALL FOR MALICIOUS PROSECUTION INASMUCH AS WALL NEITHER INITIATED NOR TOOK PART IN THE SAME.

a) One who is neither a participant in, nor instigator of, a prosecution may not be held liable therefor.

It is fundamental to sustain an action for malicious prosecution that the party against whom damages are sought either instigated the prosecution or participated in its continuance. Mere inaction or knowledge of the prosecution is insufficient. Wolter v. Safeway Stores, 60 F.Supp. 12 (D.C., 1945), aff'd. 153 F.2d 641, cert. den. 329 U.S. 747 (1946); Everson v. First Trust and Deposit Co., 46 A.D.2d 722, 360 N.Y.S.2d 338 (4th Dept. 1974); Gregorio v. Terminal Trading Corp., 39 A.D.2d 705, 331 N.Y.S.2d 755 (2nd Dept. 1972); Macauley v. Theodore B. Starr, Inc., 194 App.Div. 643, 186

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*Jointly with the other defendants-appellants.

N.Y.S. 197 (1st Dept. 1921); Tyson v. Joseph H. Bauland Co., 68 App.Div. 310, 74 N.Y.S. 59 (2nd Dept. 1902); Wassing v. Kennedy, 9 Misc.2d 672, 170 N.Y.S.2d 58 (Sup. Kings Co. 1957); Loftus v. Columbia Ribbon and Carbon Manufacturing Co., 61 N.Y.S.2d 102 (Sup. Nassau Co. 1945).

It is well recognized that:

> "In order to maintain an action for malicious prosecution, the plaintiff must show that the defendant was responsible for the institution of the malicious proceedings, that is, the plaintiff must establish that the defendant caused or assisted in the prosecution complained of, or voluntarily advised, aided or assisted in the prosecution of the case. A mere passive knowledge of, acquiescence in, or consent to the acts of another, for which one is not otherwise responsible, is not sufficient to render the latter liable in an action for malicious prosecution; it must be shown that he was affirmatively active in instigating or participating in the prosecution." 52 Am.Jur.2d 201, Section 24 (3).

The cases cited above condition the imposition of damages for malicious prosecution upon a finding that one has acted or taken some affirmative step in initiating or participating in the prosecution.

That single, salient condition is absent in the case at bar. Wall himself took no part whatsoever in the

act of having Morrissey arrested or prosecuted. He knew nothing of the arrest at the time it was made. While he subsequently learned of the arraignment and of the preliminary hearing, he did not participate in the same. Nor did he have the power under the NMU Constitution to cause the same to be discontinued.

Even the District Court recognized the weakness of the case against Wall, as is evidenced by the following quotations from the trial record:

> "The Court: I have reservations relative to whether a prima facie case was made out against Mr. Wall ***." (509A).
>
> * * * *
>
> "The Court: Although he [Wall] signed the notice, I do not think that the mere signing of the notice would be sufficient insofar as the case is concerned relative to Mr. Wall ***." (511A).

Of greater significance is the following colliquy that took place between the Court and counsel for Morrissey:

> "The Court: He [Wall] didn't initiate the prosecution.
> Show me anywhere in the case where there is any evidence that he initiated the prosecution or carried it out or ordered that it be concluded or prosecuted or continued.
> Mr. McInerney: Your Honor, I have no direct evidence of that, but he is a member, again, of the National office and he had lifted his little finger he could have said to Curran, 'Let's lay off Morrissey'. (emphasis supplied)

The Court: That is not the point.
The point is and the query I have relative to Mr. Wall is whether he initiated the prosecution. Yes, he did nothing to stop it, but I don't believe that is enough to hold a man for damages on malicious prosecution. I think the question is whether he initiated it, whether he gave impetus to it either at the beginning or during the course of it. I presumed certain things relative to Mr. Curran. I'm sure you are going to tell me that Mr. Wall fits into the same category.
I would suggest to you, I find no writings from Mr. Wall, no statements from Mr. Wall to lead me to the same conclusions I reached relative to Mr. Curran."

"The Court: What did he do to further the prosecution? What did he do to carry out the result? You say he is responsible for a cover-up. I don't see it in the context of this case.
Mr. McInerney: Well, your Honor, he certainly is guilty of an omission. If he is not guilty of something positive, he is guilty of an act of omission here.
Mr. Mina: Your Honor, in that regard --
The Court: That is not going to help us on malicious prosecution." (519A)

No additional evidence relating to Wall was thereafter presented. It is thus apparent that even counsel for Morrissey recognized the absence of any evidence whatsoever that Wall took part in the prosecution. His only contention regarding Wall is that he was a member of the National office.

Under circumstances such as those outlined above, the trial court should have directed a verdict against Morrissey and in favor of Wall on the malicious prosecution cause of action.

As the Court stated in the Macauley case, supra:

> "*** If, as I conceive, there be found no direction or abetting of the prosecution by the defendant after the plaintiff was charged with this crime, and after the matter had been put into the hands of the criminal authorities, there can be no liability for damages for malicious prosecution." 186 N.Y.S. 197, 207.

Similarly, in Loftus v. Columbia Ribbon and Carbon Manufacturing Co., Inc., supra, the Court dismissed the cause of action charging malicious prosecution against the employee of the corporate defendant and the defendant itself, stating:

> "The fourth cause, charging malicious prosecution *** 'at the instance and with the consent and approval of' the corporate defendant 'maliciously and without proper cause, caused plaintiff herein to be arrested' ***. The words employed to fix responsibility upon the corporate defendant are passive in nature. They should be words showing action attaching to defendant either the instigating of the prosecution, participation in its continuance or the direction of it; mere knowledge of the existence of the complained of prosecution is insufficient." 61 N.Y.S.2d 102, 104-5.

b) An officer is not liable for torts in which he did not participate.

The verdict rendered by the jury, founded as it could only have been upon Wall's position as a national officer of the union, was, of necessity, based upon the proposition that he was responsible for acts either of the corporation, his co-officers or of other employees of the union. Such a position is unfounded. As was stated in Teledyne Industries, Inc. v. Eon Corp., 373 F.Supp. 191, 176 (S.D.N.Y. 1974):

> "The standard against which the liability of the individual defendants is to be measured is a familiar one. It is now well settled that an officer or director is not, merely by virtue of his office, liable for the tortious acts of the corporation. He must direct, authorize or in some meaningful sense participate actively in the assertedly wrongful conduct."

Similarly:

> "The ordinary doctrine is that a director, merely by reason of his office, is not personally liable for the tort of his corporation; he must be shown to have personally voted for or otherwise participated in them." Armour and Co. v. Celic, 294 F.2d 432, 439 (2d Cir. 1961)

To the same effect, see Phelps Dodge Refining Corp. v. F.T.C., 139 F.2d 393 (2d Cir. 1943); Lobato v. Pay Less

Drug Stores, Inc., 261 F.2d 406 (10th Cir. 1958); Zubik v. Zubik, 384 F.2d 267 (3rd Cir. 1967); Blaustein v. Pan American Petroleum & Transport Co., 263 App.Div. 97, 31 N.Y.S.2d 934, aff'd. 293 N.Y. 281 (1944); People v. Alrich Restaurant Corp., 53 M.2d 574, 279 N.Y.S.2d 624 (Dist. Nassau Co., 1967).

The fundamental fiduciary relationship of officers and directors to their shareholders is analogous to the relationship of officers and trustees of a union to members of that union under Landrum-Griffin.

c) Having set aside the verdict for punitive damages for malicious prosecution against the NMU, the Court was bound to do the same for Wall.

At no time was the issue of Wall's participation in any of the acts underlying the basis for plaintiff's claim of malicious prosecution raised. In fact, as has been heretofore indicated, plaintiff's counsel conceded that there was no evidence of Wall's direct participation in any of the acts. Wall's only act, as has been repeatedly stated, was to sign a notice at the request of the union's Chief of Security, an act which, at the time, was well founded upon the desire of the Chief of Security to keep peace within the union hall and to prevent disturbances from breaking out.

Thus, it was only through his position as a union officer, and, presumably, on the basis of respondeat superior, that Wall could have been held liable. Since the Court below, under the holdings in Martin v. Curran, 303 N.Y. 276 (1951), and Gulickson v. Forest, 290 F.Supp. 457 (E.D.N.Y. 1968), granted defendant's motion to set aside the verdict which awarded punitive damages against the union for malicious prosecution, there can be no liability on the part of any one of its officers who was a non-participant. Nor can any support be found for the proposition that Wall was responsible for the acts of Snow, the Chief of Security. There was no proof of ratification offered that Wall approved of or consented to the arrest of Morrissey. Wall was not Snow's superior and, indeed, he had no supervisory or other duties relative to Snow. If liability can be found on this singular basis, then surely it is a liability unique to the law of labor organizations, a liability which has never heretofore been imposed.

d) Wall lacked the requisite malice sufficient to support the award of compensatory or punitive damages.

Malice is, of necessity, and by definition, an essential ingredient of malicious prosecution, the burden

of proof of which rests on the plaintiff. Goldstein v. Siegel, 19 A.D.2d 489, 244 N.Y.S.2d 378 (1st Dept. 1963); Vennard v. Sunnyside Savings & Loan Ass'n., 44 A.D.2d 727, 354 N.Y.S.2d 446 (2nd Dept. 1974). It has been defined as arising from the existence of ill-will or sinister purpose (Linitsky v. Gorman, 146 N.Y.S. 313), or the want of probable cause (Halsey v. New York Society for Suppression of Vice, 234 N.Y. 1 (1922)), but actual malice requires proof,

> "of some deliberate act punctuated with awareness of 'conscious falsity' ...". Best v. Genungs, Inc., 46 A.D.2d 550, 363 N.Y.S.2d 669 (3rd Dept. 1975).

Where plaintiff fails to prove hatred or ill-will, the claim should be dismissed. Schanbarger v. Kellogg, 43 A.D.2d 362, 352 N.Y.S.2d 50 (3rd Dept. 1974). It is not only the ill-will that must be proven, but its relation to the prosecution. Even where one participates in the prosecution of a party towards whom he bears ill-will, the requisite malice is not proven. As was stated in Linitsky v. Gorman, supra:

> "But an unlawful act is not necessarily a malicious act. The mere existence of an ulterior purpose or personal anger and hostility towards the person proceeded against is not always inconsistent with good faith in bringing the proceedings, and does not necessarily create liability therefor." 146 N.Y.S. 313, 316.

The absence of proof against Wall mandates a holding that malice was not proven and, therefore, the judgment against Wall should be set aside. The nature and quantity of the evidence offered related only to Curran and the statements made by Curran against Morrissey. None of the same may be considered against Wall, nor was there any effort made to prove that Wall either participated in or condoned the statements made by Curran.

Aside from the foregoing, and even were Morrissey to prove that Wall had in some way participated in the acts alleged to have been committed against him, nevertheless punitive damages should never have been awarded against Wall. The degree of malice sufficient to sustain punitive damages is higher than the degree necessary merely to prove malicious prosecution. This more stringent standard necessitates a finding that the party against whom damages are sought was guilty of

> "wanton and reckless disregard of the rights of the plaintiff". Brown v. McBride, 24 Misc. 235, 52 N.Y.S. 620,621 (Sup. Queens Co. 1898).

To the same effect, see DeMarrasse v. Wolfe, n.o.r., 140 N.Y.S.2d 235 (Sup. Queens Co. 1955), where the court stated that the action must be

"wanton or malicious, or gross or outrageous, or there must appear a desire to oppress and injure". 140 N.Y.S.2d 235, 238-9.

Thus, even if it was held that Wall, in the course of his duties, acted with regard to what was believed to be a long-existing policy of the union, and participated in an act which is found to have been improper solely by reason of the failure to promulgate the union policy as required by the Constitution, nevertheless, such act must be held to have been of a degree insufficient to sustain the award of punitive damages.

POINT II

THE COURT BELOW ERRED IN FAILING TO SET ASIDE THE VERDICT GRANTING PUNITIVE DAMAGES AGAINST WALL UNDER THE LANDRUM-GRIFFIN ACT.

Appellants have argued, in their core brief, and the argument will not be repeated herein, that there can be no punitive damage awarded against a union official for violation of Section 411(a)(2) and Section 411(a)(5) of the Landrum-Griffin Act.

Nevertheless, it is evident from a reading of the cases involving violations thereof that even a union will itself be subjected to penalties for violations of its

members' rights only when its conduct has been of a discriminatory and highly egregious nature. The inaction of Wall and his non-participation in any of the acts complained of will not be reiterated. It should be sufficient to note that, even had Wall participated in the acts complained of, the same would not have subjected him to any liability whatsoever under the Landrum-Griffin Act, since he was, at all times, acting solely within the scope of his authority as the national Secretary-Treasurer.

This position has repeatedly found support in actions brought under the Landrum-Griffin Act. In White v. King, 319 F.Supp. 122 (E.D.La. 1970), the court held:

> "***[R]elief against union officials individually can only be predicated by a showing that those officials acted outside their official capacities ***." 319 F.Supp. 122, 126.

To the same effect, see also Nix v. Fulton Lodge No. 2, 262 F.Supp. 1000 (N.D.Ga. 1967), aff'd. in part, vacated in part on other grounds, 415 F.2d 212.

It is quite one thing to hold that an officer who directly participates in an act outside the scope of his union authority is personally liable. To hold a non-participating

union officer liable on the theory of respondeat superior when the union itself is not found liable is, however, a totally untenable position. Certainly, it cannot be argued that the mere act of Wall's posting the notice, at the behest of Snow, in order to prevent disturbances in the union hall, was such an act as to warrant the imposition of any liability. Assuming, arguendo, that the same was considered an act connected with the eventual arrest of Morrissey, nevertheless, he was clearly acting in pursuance of the request made by the appropriate union employee acting within the scope of his own authority and Wall's signature thereon must, as a matter of law, be held to be within the scope of his own authority.

The Court's charge in respect of the liability of an officer under 411(a)(2) or 411(a)(5) was thus erroneous. With respect to the liability of such an officer, the Court charged (616A):

> "If you find that defendants, or, any of them violated either of these 2 sections of the Landrum-Griffin Act, you will find for plaintiff on his first cause of action."

The Court failed to charge the jury on the question of the scope of Wall's authority as an officer of the union and further failed to charge the jury that liability under

411(a)(2) or 411(a)(5) required a finding that a particular officer participated in the acts complained of and that such acts were beyond the scope of his authority. The failure to so charge the jury was prejudicial and erroneous as applied to Wall, who was guilty of nothing more than inaction in the face of a highly planned and coordinated effort by Morrissey to challenge a union policy adopted and enforced for purposes other than stifling this plaintiff-appellee.

POINT III

THE FAILURE TO GRANT A CONTINUANCE BASED ON THE ILLNESS OF CURRAN CONSTITUTED REVERSIBLE ERROR.

In their core brief defendants-appellants have argued the primary thrust of the failure of the trial judge to grant a continuance based on Curran's illness. The denial of defendants-appellants' motion for such continuance, however, was particularly prejudicial to Wall. As the only other national officer being sued, he evidently was, in the eye of the jury, acting in concert with Curran and any statements attributable to Curran were similarly imputed to Wall. It is only such a reading of the facts in the case by the

jury that could have resulted in the large verdict against Wall.

Nevertheless, there was no testimony linking Wall to Curran, other than the fact that they were both national officers of the union. It is this very state of facts which was foreseeable by counsel for defendants-appellants in moving for a continuance and which should have been foreseeable by the trial court.

A similar position was noted by the court in the case of Latham v. Crofters, Inc., 492 F.2d 912 (4th Cir. 1974). In Latham, an individual defendant, Griffith, who was also president of the defendant-corporation and a partner in the defendant-partnership, became ill on the morning of trial. His counsel sought a continuance on the grounds that Griffith's health would not permit him to attend. Griffith was an attorney who was to defend himself in the action with the help of associate local counsel. His motion for a continuance was denied and, after a jury trial, a verdict against all defendants for $223,944.70 was awarded. The Court of Appeals, in reversing and granting a new trial, considered the effect upon the remaining defendants in the absence of Griffith. They concluded that any defense to plaintiff's cause of action would have

had to come primarily from Griffith, since he played an active role in the transactions which formed the subject of the complaint. By reason thereof, they held the remaining defendants suffered

> "substantial prejudice in being forced to trial without his presence". 492 F.2d 913, 916.

It is clear in the instant case that the deposition testimony of Curran, which was read into the record, together with the additional statements attributable to Curran from the NMU Pilot, created an atmosphere of prejudice and confusion as to the other defendants from which, without Curran's testimony, they could not extricate themselves.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Judgment below should be reversed, that Judgment N.O.V. should be granted to Defendant-Appellant Shannon J. Wall, or, failing that, a new trial should be ordered.

Respectfully submitted,

BLOOM & EPSTEIN
Attorneys for Defendant-Appellant, Shannon J. Wall

OF COUNSEL,

HAROLD EPSTEIN
ROBERT M. MILNER
WARREN B. PESETSKY

A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
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- against -

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Defendants- Appellants.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at*

1235 Plane Street, Union, N.J. 07083

That on the 28th *day of* November *19* 75 *, deponent served the annexed*

upon 1) Harold E. Kohn P.A. *attorney(s) for*
2) KENNETH J. FINGER

in this action, at 1) 1700 Market St. Phil, Pa.
2) 14 Mamaroneck Ave, White Plains N.Y

the address designated by said attorney(s) for that purpose by depositing 2 *true copy* s *of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this 28th
day of November *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Eugene L. St. Louis

Print name beneath signature

EUGENE L. ST. LOUIS

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

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STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 W. 146th St., New York, N.Y.

That on the 28th *day of* November *19*75 *at* see attached

deponent served the annexed Brief *upon* see attached

the Attorney s *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 28th
day of November *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

James A. Steele
JAMES A. STEELE

ABRAHAM E. FREEDMAN
Attorney for Defendant- Appellant- Appellee
346 West 17th Street
New York, New York 10011
(212) 929-8410

DUER & TAYLOR
Attorney for Plaintiff- Appellant- Appellaa
74 Trinity Place
New York, New York 10006
(212) 944 -7482

FEDER, KASZOVITZ & WEBER
450 Seventh Avenue
New York, New York 10001
(212) 239-4610

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Eugene L. St. Louis
Print name beneath signature
EUGENE L. ST. LOUIS